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Dilworth Woolley; Therald N. Jensen; Attorneys for Respondent;

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In the Supreme Court of The State of Utah

MAC PETERSON, as Executor of the Last
Will and Testament of John S. Peterson, De-
ceased,

Plaintiff and Respondent,

vs.

VERGA PETERSON ANDERSON,

Defendant and Appellant.

Respondent's Brief

Appeal from the District Court, Sanpete County,
State of Utah.

Honorable F. W. Keller, Judge.

FILED

DEC 19 1949

DILWORTH WOOLLEY,
Manti, Utah,

THERALD N. JENSEN,
Price, Utah,

Attorneys for Repspondent.

CLERK, SUPREME COURT, UTAH

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No. 7291

VERGA PETERSON ANDERSON,

Defendant and Appellant.

PART I

STATEMENT OF FACTS

In September of 1944, when John S. Peterson was 79 years of age, he transferred the title to a hotel property which he owned in Gunnison, Utah, to his daughter, Verga Peterson Anderson, defendant and appellant in this action, upon her promise to make a home for him as long as he lived; and he thereupon went to live at the hotel although he owned a home just across the street. He continued to live at the hotel until a few weeks before his death, which occurred on February 22, 1947, when he was moved across to his own home because it was more convenient to take care of him there than at the hotel.

John S. Peterson had made a will many years prior to the transfer of the hotel property to Verga, in which he bequeathed one-third of his estate to his wife, Maria,

if she survived him and the remaining two-thirds to his nine children in equal shares. His wife did not survive, and, there being no residuary clause in the will, which remained unchanged, he died intestate with respect to the one-third of his estate bequeathed to his wife, which will go to his nine children in equal shares under the laws of succession; the other two-thirds going to them in the same shares under the will.

Of his nine children two lived in Gunnison, namely, Vance B. and Verga; two lived in Colorado and two in California. The others lived elsewhere but the record does not give their places of residence.

While John S. was living at the hotel three of his children obtained from him a considerable part of his estate in money and in other property. His son, Alvie, got \$3000.00. No note or other memorandum was found relative to this transaction, but Alvie acknowledges that he got it as a loan from his father and promises to pay it back or take credit against his share of the estate for the amount. Vance B. got from the father a deed covering a furniture store and meat market in Gunnison. While Verga got from him four different sums of money at four different times, namely, \$600.00, \$300.00, \$500.00 and \$4545.00.

The plaintiff brought this action against Verga to recover those several sums, claiming that they represented moneys which the father had lent to her and which she had not repaid. (See the second cause of action in the complaint, Tr. 3.)

As there were no notes or other writings found among the effects of the deceased to show the nature of the transactions respecting the moneys which Verga had received,

as there was none relating to the transaction with Alvie and also the deal with Vance B., we had to rely upon the only evidence available, which came from the lips of the defendant herself.

We called witnesses who testified to statements and declarations made by the defendant in the presence and hearing of members of the family in which she admitted, confessed and declared that, as to the \$500.00 item and the \$4545.00 item, she had borrowed the money from her father for certain specific purposes.

We deem it advisable to quote from their testimony as it is contained in the bill of exceptions.

Billie Peterson Clinger, a sister of the defendant, referring to the \$4545.00 item, testified as follows:

“Q. All right, what happened?

“A. After we were discussing where it (the money which had been withdrawn from the bank account) could be and wondering and everything, Mrs. Anderson popped out with—she said, “I know where the money went. Dad paid off my mortgage at the bank for me and it was a loan. He loaned me the money to pay off my mortgage.”

“Q. Is that what she said?

“MR. LARSON: You say that is what she said?

“A. I definitely do. That is what she did say. She said it was a loan to pay off her mortgage, that Dad had loaned her that money.

“Q. How much was that?

“A. \$4,500 some odd dollars, I am not sure of the exact cents.” (Tr. 7.)

In reference to the \$500.00 item, she testified as follows:

"Q. And then a \$500.00 check on May 27, 1946?

"A. That's right.

"Q. Did she tell you anything about that check, that \$500 check?

"A. Yes she did. She said that she told Dad that she was going to take that and do some extra alterations and that she was going to give him the rent from those rooms.

"Q. Pay it back, to pay back that \$500 to him?

"A. That she would give him the revenue from the rooms which she spent the \$500 on to repay the loan.

"Q. Well, how did she happen to get the \$500? Did she tell you?

"A. She was on a bond for my brother, Merrill, and she wanted to be released from bond so Dad gave her this \$500 check to take care of her release.

"Q. To put up a cash bond?

"A. Yes, a cashier's check of \$500 and when she took that up it seems it wasn't enough, so she was going to try to be released from his bond and put up this \$500 cash but, she found out it wasn't enough or for some other reason, I don't know why, so she kept the check and the check was made out to Gilbert Fjelsted and then later she cashed that check.

"Q. Did she say she was going to pay that back to your father out of the rent from some rooms? (Tr. 8.)

"A. From the rooms. She told us that the way the proposition was that she was to use the \$500 to build those rooms, and she made that proposition to Dad, and she was going to repay him the \$500 from the revenue from the rooms. She was to pay him that as it came in. That is what she told us." (Tr. 9.)

Jessie Sprott, another sister of the defendant, testified as to this item of \$4545.00 as follows:

"Q. Did the discussion relate to these missing checks, check stubs?

"A. It did.

"Q. Did Verga say anything about it?"

"A. Yes, she told us - - -

"Q. What did she say?

"A. May I tell it in my own words?

"Q. Yes, I am asking you now to relate what she said in regard to those missing check stubs and the money that had been taken out of the bank on the checks if there had been any checks issued against stubs which had been removed?

"A. She stated that she had a premonition from my mother in the night telling her to ask, have Dad pay off the mortgage on her home, on the hotel. So she had Dad pay off the mortgage for her as a loan and the other money, it was just a mortgage on the hotel that we referred to at that particular moment because that was the money that had been taken from the estate and we were having more difficulty checking on it." (Tr. 21.)

And on cross examination:

A. After all the commotion going on and she learned how we were feeling and how upset we were and all about it and one thing and another she said before that she mentioned it was a loan and after she found how upset we were about she said it was a gift." (Tr. 25.)

Veyda Peterson Pardoe, another sister of the defendant, having testified that the members of the family met after the funeral and were examining the bank account of

their father and found that some of the check stubs were missing from his book, Verga came in (Tr. 30), and she testified as follows:

“Q. Did Verga make any statement at that time when she came in regarding the missing check stubs?

“A. After so much discussion and she saw that they were all excited and worked up about this she came over and she said that is the money that Dad made a loan to me to pay the mortgage off, or Dad loaned to me to pay the mortgage off.

“Q. What was she referring to when she made that statement?

“A check for \$4500 and some odd dollars.

.

“Q. All right what did she say about that check?

“A She said that was the money Dad had given her to pay the mortgage, it was the money that Dad had loaned to her to pay the mortgage off at the bank. That was the statement she made at the time. However, later after there was so much arguing and quarrelling she saw there was no way of any of us getting together she came and told us that it was a gift to her from Dad after she admitted it being a loan.

“Q. When was it she told you it was a gift?

“A. I don't know whether it was that evening or the next day but it was before we returned back to Colorado.

“Q. State whether or not she had been up and talked to Mr. Larson in the meantime?

“A. Yes, she had. After that we never talked to her except in Mr. Larson's presence.

“Q. And then it was that she told you it was a gift,

is that right?

"A. That's right." (Tr. 31-32.)

Referring to the \$500 item, she testified as follows:

"Q. Well what did she say about that item?

"A. She said that she had gotten, wanted to be released from Merrill's bond and Dad had given her a check for \$500 and that she had taken that money to fix up one room on the main floor and told him that she would rent that bedroom and he could have the money that was received in rent for it. She fixed a bedroom down there on the main floor.

"Q. In the hotel?

"A. In the hotel and she told us that she made the arrangement with him that she would remodel this room and then he was to have the rent from that particular room for the \$500, in payment of the \$500." (Tr. 32-33.)

Mac Peterson, appellant's brother, referring to her statements regarding the \$4545.00 item, testified as follows:

"A. That was Thursday night. (Tr. 62.)

.

"Q. All right. What did Verga say about that item of \$4545.00?

"A. She made the statement that her Dad had loaned her that money to pay off the mortgage of the Gunnison Hotel." (Tr. 63.)

Referring to the item of \$500 he testified:

"Q. Did you talk about an item of \$500?

"A. Yes, sir.

"Q. Did you find a stub for a check of \$500?

"A. No, sir, I didn't." (Tr. 64.)

.
 Verga had remained silent about the \$500 until after Mac had found out about the \$500 having been withdrawn from the bank. (Tr. 66.)

.
 Then she explained how she got the \$500 to put up as her part of a cash bond for Merrill. (Tr. 67.)

.
 "Q. That \$500 cashier's bank check had been credited in September to the account of Mrs. Anderson and her husband in the name of the hotel?

"A. That is right.

"Q. Well, then did you confront Verga with that and ask her to explain it?

"A. Yes.

"Q. And what did she say about that?

"A. She said that Dad had made her a loan of that, that money to fix up another room.

"Q. In the hotel?

"A. In the hotel. There was one room in the dining room that she was going to have converted and made into a bedroom and she said that she had used that \$500 to convert that dining room into another bedroom and that she was going to pay him back out of the proceeds of the room. Pay him back the \$500 out of the proceeds of the room." (Tr. 68.)

Counsel for appellant in the brief, at page 20, says:

"Defendant, as a witness, however, denied making the statements attributed to her by plaintiff's witnesses. She offered witnesses who corroborated her denial that she had stated the money was a loan."

The record does not bear out counsel's statement. The defendant did not deny that she made any of the statements which were attributed to her by the witnesses above mentioned; nor did she offer any witnesses to corroborate her denial. We have carefully read and reread her testimony and we find therein no such denial.

So we assert that the testimony given by the witnesses and which we have set out verbatim from the transcript stands undenied by the defendant.

Upon the foregoing evidence the court found as facts that on January 29, 1946, the defendant borrowed from John S. Peterson the sum of \$4545.00, and that on or about May 31, 1946, she borrowed from him \$500.00, which sums she had not paid back to him nor to the executor; and entered judgment for said sums and interest. (See: Finding of Fact 4, and Judgment. Tr. 29 and 30.)

Before proceeding with our argument, there is one other statement made in appellant's brief, on page 25, to which we wish to advert. It is as follows:

"The trial court itself states that the proof of the circumstances under which defendant received the money was somewhat vague."

Such statement of counsel, if it is intended to refer to the items of \$500 and \$4545, is a palpable misstatement of the record; for what the court referred to, when he said, in deciding the case, that the proof was vague, were the items of \$300 and \$600. And because the proof was vague in regard to those items the court found the issues in favor of the defendant and against the plaintiff. (Tr. 110.)

PART II ARGUMENT

The argument of counsel is that admissions are not competent evidence upon which to rest findings of fact upon material issues; that the only evidence in this case to prove that Verga borrowed the money from her father is found in her admissions; and that therefore finding No. 4, upon which the judgment rests, is not supported by any competent evidence.

We challenge that argument at the major premise and at the conclusion.

Admissions

We declare that admissions against interest are competent evidence against a party and are sufficient to sustain findings upon material issues; and that finding No. 4 is supported by sufficient, and indeed, by undisputed and uncontradicted evidence in this case.

That admissions are competent evidence and that they are sufficient evidence upon which to rest findings of fact upon material issues has already been decided by this court. The proposition is not open to argument at this late date. It was decided adversely to appellant's contention in the case of **Mehr v. Childs, et al.**, 90 Utah 348, 61, P 2d. 624, which is one of the cases cited in our opponent's brief.

In that case there was an issue of fact whether or not a child of the defendants who was driving their car was their servant or agent at the time of an accident. The plaintiff and another witness testified that in the spring of the year following the accident they went to the home of the defendants; and that at that time the defendants

said that on the occasion in question their daughter, Alberta, had taken the car not only with their consent but that they sent her to Ogden to get another daughter who was working there. Defendants denied making any such statements. The question before this court was: Does the evidence support a finding that Alberta Child was the agent or servant of appellants at the time of the collision? Mr. Chief Justice Elias Hanson, writing the opinion for the court says:

"It is earnestly urged by appellants that the first question must, as a matter of law, be considered in the negative. The law applicable to admissions is thus stated in 3 Jones Commentaries on Evidence (2nd Ed.) p. 1973, (Sec.) 1072: "When an admission is clearly proved and shown to have been made with deliberation, it is not necessarily weak evidence, nor does it require corroboration; on the contrary, when admissions are so proved, they may have great inherent force as evidence. To the extent of the subject matter of the admission, it makes out a prima facie case and dispenses with other proof of the fact admitted until rebutted. And a finding of fact, resting solely upon an extrajudicial admission, is not, for that reason, unsupported by substantial evidence."

The court goes on to say that numerous cases cited in the footnote support the text; and that the law announced in the foregoing text is cited and followed by this court in the case of **Peterson v. Richards**, 73 Utah 59, 272 P. 229; and the court concludes its discussion of this subject with this sentence:

"The verdict and judgment are not vulnerable to the attack that they were without support in the evidence."

The admissions relied on in this case were clearly proved. Four witnesses testified to them. The defendant did not deny that she made such admissions. It is also apparent from the record that she made them with delibera-

tion. The record shows that she stood around all afternoon, while Mac and Billie were trying to find out who got the money from their father's bank account, knowing all the time where the money went; it also shows that she tried to conceal from the knowledge of the family the fact that she had obtained this money from her father, by abstracting the stubs from the check book; and that she did not open her mouth to inform the family what had become of the money until Merrill accused Vance of getting it and until everybody got mad and it looked like there was going to be a fist fight among the family. After all these things had transpired, she finally came out with her statements which the witnesses related. She confessed that she had got the money and that she had borrowed it from her father, the \$4545.00 to pay the mortgage on the hotel and the \$500 to fix up a room in the hotel. She did not even suggest by anything she said at first that her father had intended to give the money to her but what she did say clearly proves that she felt obliged to pay it back to him or to his estate. It was not until after she had been up to Manti and talked with her attorney that she put forth the claim that these items were gifts.

There are no surrounding circumstances which support the theory of a gift. There was no reason why John S. Peterson should give Verga this money, even if he did lend it to her, or let her have it as an advancement. He had given her the hotel, a valuable property; he had also given her \$300 and \$600 in two previous transactions. She was taking care of him at the hotel and she must have thought that she was being well paid for that service. He had let Alvie have \$3000, without a note or other writing,

but this admittedly was a loan and not a gift. He intended that all his children should share equally in his estate, as evidenced by the fact that he so provided in his will.

He did not voluntarily pay off the mortgage on the hotel because he did not want to live under a roof with a mortgage on it. He paid off the mortgage because she asked him to do so. She went over to the bank with him when he paid it off. (Tr. 106.)

As far as the \$500 is concerned, she got that money to use as a cash bond for Merrill and then used it to fix up another room in the hotel and promised her father that she would pay it back out of the rent.

She spoke the truth when she first opened her heart and disclosed to the family how she got all that money from her father. It was only after further deliberation and consultation with her attorney that she came out with the idea that the money was given to her outright.

The testimony of the witnesses above outlined, coupled with the fact that defendant attempted to conceal and did conceal from the family the nature of her transactions with her father, and that she removed stubs from the check book to that end, brought conviction to the mind of the trial judge that the money which she received was intended by the parties to the transaction to be lent and not given; and that it should be repaid and not kept.

The trial judge saw the witnesses, observed their demeanor and manner of testifying, and appraised their credibility; and, doubtless, took into consideration the fact that defendant, though she had the opportunity to do so, did not deny that she made the statements attributed to her by her brother and sisters. And having done these

things, the trial judge found as a fact that defendant borrowed the money from her father. The trial judge evidently did not believe the defendant when she afterward stated that her father gave the money to her.

The Weight of Evidence

If this is an action at law, as we think it is, our brief might well end at this point; for in that case the findings of the trial court which are challenged on this appeal are binding upon this court, being supported by some competent evidence. If this is a law case this court is limited to a review of the evidence to see whether there is any competent evidence to support the findings; and this court will not weigh the evidence to see where it preponderates; Furthermore, if this is a law case, then the trial court is the sole judge of the credibility of the witnesses and of the weight to be given to their testimony and it is solely for the trial court to draw the inferences of fact from the testimony of the witnesses. So if this is a law case then we ought not to impose upon the court any further argument, having demonstrated by the evidence which we have set out and the case which we have cited that the challenged finding is supported by competent evidence.

But the appellant, assuming that this is an equity case, has also argued that the challenged finding is contrary to the weight of the evidence. And as we have no way of forecasting what the court may think about the case, whether it is at law or in equity, we feel it advisable that we give the court the benefit of our views upon the subject of the weight of the evidence.

On that subject we say that there is no evidence in the case which requires a finding different from the one

made by the trial court.

The evidence upon which the court based its finding stands undisputed. The defendant did not say, when she had the opportunity to do so, if she desired to do so, that she did not make the statements attributed to her by her brother and three of her sisters. She was not asked either in direct or in cross examination to admit or to deny these statements. All she testified to was that later, after she had consulted her attorney, she claimed that her father had given her the money.

No witness for the defendant testified to anything which would compel finding in favor of the defendant. Even if John S. Peterson made the statements attributed to him by the defendant, her son, her husband, her servant and her friend, there is nothing in them which requires the court to conclude that he did not intend that Verga should repay the money either to him or to his estate. There is nothing in those statements inconsistent with the idea of debt; there is nothing in them which compels the idea of gift; or even of gift by way of advancement. They only go to show that John S. felt good because he had helped Verga by paying off the mortgage on the hotel. Furthermore, they do not refer to the \$500 item which is included in the judgment.

Presumptions

Appellant contends that there is a presumption that the father gave the money to his daughter. (Page 21 of the brief.) But so far as presumptions are concerned, if we were to rest the case upon presumptions, we submit the law is not in favor of the defendant. Counsel cites, among others, the case of *In re Pickenbrock's Estate*, 102 Iowa,

81, 70 N. W. 1094, 26 A. L. R. 1146, to the proposition that there is a presumption that the money was a gift.

In this connection we call the court's attention to the fact that that case is cited in the note in 26 A. L. R. 1146, to the following paragraph:

"A number of cases support the doctrine that a payment by a parent of a substantial amount to discharge a debt of a child will be deemed *prima facie* to be intended as an advancement."

Also, we call the court's attention to the following paragraph in that same note, appearing at page 1108 of 26 A. L. R.:

"It is the general rule supported by many cases that, unless there is something in the circumstances to raise the inference of a different purpose a substantial gift of money or property from a parent to a child will ordinarily be presumed to be an advancement."

Since we feel that the foregoing statements are sound law, the presumption in this case, if we had to depend upon presumptions, would be that these were advancements and not outright gifts.

But we are not required to depend upon presumptions. We have sufficient evidence in the case to show that John S. intended to help his daughter by lending her the money, which evidence comes from her own lips.

It may be admitted that there are three possible conclusions one of which may be drawn from the circumstances shown in evidence, if we lay aside the defendant's admissions and consider only the other facts in the case, namely: (1) That the money was a gift; (2) that it was a gift by

way of an advancement; and (3) that it was a loan. Defendant's admissions aside, probably the finding should have been that this was a gift by way of advancement, which should have been charged against defendant's share in the estate. But when her admissions are put into the scales, the balance is all in favor of number 3.

We therefore respectfully submit that the challenged finding is supported by the preponderance of the evidence.

IN GENERAL

As to the various matters discussed and cases and statutes cited on pages 15, 16, 17, 18, 19 of the opposing brief, we have no quarrel except one statement, which is this, found on page 16:

"Likewise, if there is evidence to support them (findings), then said findings should be supported by a statement thereof."

We do not understand that such is the rule of practice. The findings must be supported by the evidence or by allegations in the pleadings which are admitted by the adversary. But it is never required that the court state the evidence which supports the findings.

CONCLUSION

We accepted the burden of proof and carried it; the court made findings of fact which support the judgment; those findings are supported by competent evidence, and also by the preponderance of the evidence.

We respectfully submit that there is no error in the record, that the judgment does justice between the parties, and that it should be affirmed.

Respectfully submitted,

DILWORTH WOOLLEY,
THERALD N. JENSEN,
Respondent's Attorneys.